Burrows Paper Corporation *and* PACE International Union, Local 678, AFL–CIO.[1] Case 26–CA–18552

September 15, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On January 13, 1999, Administrative Law Judge Keltner W. Locke issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

1. In adopting the judge's finding that the Respondent engaged in surface bargaining in violation of Section 8(a)(5) and (1) of the Act, we emphasize, in addition to the factors primarily relied on by the judge (including the Respondent's minimum wage position and its proposed recognition clauses), that the Respondent's initial proposal would have limited any agreement to 1 year from the date of the representation election and that even after the Respondent later abandoned this position, it adopted the stance that a contract would be effective only for 1 year from ratification. Further, the Respondent advanced proposals that would have allowed essentially no role for the Union in determining wage rates. Thus, the Respondent's November 1997 proposal provided for an annual review of finishing room wages by the paper division manager, who would make changes at his sole discretion, based on performance, waste, and marketplace competitive forces. The proposal included no role for the Union in determining the wages of unit employees. Similarly, the Respondent's January 1998 proposal included a provision allowing raises to be selectively awarded to individual employees based on managers' determinations of merit. Merit determinations, in turn, would not be subject to the grievance process, but would be appealable to the human resources manager, whose decision would be final.

In addition, during bargaining, the Respondent consistently adhered to its position that any agreement would not include a grievance and arbitration process, unless management had the final word on all grievances. At the same time, the Respondent insisted on a no-strike, no-lockout clause, and proposed very broad management-rights provisions conferring on the Respondent's complete discretion as to, inter alia, hiring, promotion, demotion, retention, layoff, assignment, transfer, training appraisal, discipline, suspension, and discharge. The Respondent also adhered to the view that its nine paid holidays should be eliminated, along with sick leave and its existing pension plan, and that it would not accept any provision by which it would collect and forward union dues.

These positions are given added flavor by the testimony of Michael Tourné, an international representative of the Union who negotiated on its behalf. Tourné stated that R.W. Burrows Jr., the Respondent's chief executive officer, told him during negotiations that the Union's only purpose was to collect dues, that he did not personally recognize the Union as the employees' representative, and that the Union was an outsider unwelcome in the plant.

Tourné further testified that Burrows told him that he wanted to continue to run the business as he saw fit, as he had before the advent of the Union, and that it was hard to see why anyone would want to be a member of the Union after July 31, 1998 (1 year after the date of the Union's election victory). Burrows, according to Tourné, asked him if there could be another vote because he was still not convinced that the Respondent's employees actually desired the Union's representation.

We do not maintain that each of the above items, considered in isolation, evidence bad faith. However, viewed in the aggregate, this evidence, in addition to the evidence

[1] On January 4, 1999, the United Paperworkers International Union, AFL–CIO, CLC merged with the Oil, Chemical and Atomic Workers International Union. Accordingly, the caption has been amended to reflect that change.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] We adopt the judge's recommendation that the Union's certification year be extended in accordance with *Mar-Jac Poultry*, 136 NLRB 785 (1962), as well as his findings that the Respondent violated the Act by, inter alia, engaging in surface bargaining from about October 15, 1997 (when negotiations on an initial collective-bargaining agreement began), through July 1998. Accordingly, we find that a 1-year extension of the Union's certification year, running from the date the Respondent begins to bargain in good faith, is necessary to effectuate the purposes of the Act and to allow the Union a reasonable period of time for good-faith bargaining, free from the influences of the unfair labor practices previously committed by the Respondent. *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 5, 1045–1046 (1996).

relied on by the judge, persuades us that the Respondent engaged in surface bargaining.[4]

2. We agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally granting wage increases in January and February 1998 to certain finishing room and maintenance employees.

At the November 12, 1997, negotiating session between the Respondent and the Union, the Respondent submitted a "First Proposal Agreement" which sets forth proposals as to a number of items. One of the items was a proposal to increase the wages of certain finishing employees effective January 5, 1998, to apparently redress pay discrepancies among employees in that area. The judge credits the testimony of Union Representative Michael Tourné that he was not expecting the raises to be implemented without further discussion. Nevertheless, on November 13, the day after Respondent proposed the wage increase, the Respondent issued a notice to employees that the wage rate would be effective on January 5, 1998.[5] Although the Union had requested Respondent to bargain in December, Respondent stated that the earliest it could meet was mid-January. Thus, despite the Union's efforts to schedule meetings, the parties were not scheduled to meet and did not meet between the time the Respondent proposed the wage increase and its January 5 implementation.

At the next bargaining session, January 21–22, 1998, the Respondent proposed a wage increase for certain maintenance employees effective February 2, 1998. The increase was apparently modeled on a skill-based system already in effect at another of the Respondent's facilities. The Respondent's bargaining proposal at that session declared that "all statements in this proposal are merely that—a proposal. These statements should not be construed as contract language." The Union did not respond at the meeting and the parties were not scheduled to meet again until February 11 and 12. Nevertheless, the Respondent implemented the maintenance employees' wage rates on February 2.

The judge found that because there was no impasse, the Respondent could not lawfully implement these changes without the Union's assent. He further found that the Union did not waive its right to bargain about the increases. Contrary to our dissenting colleague, and in agreement with the judge, we find that there was no agreement or waiver here.

It is undisputed that contract negotiations were not at impasse when the January and February wage increases were granted. The Respondent therefore could not lawfully implement the wage increases without the Union's assent[6] or waiver of its right to bargain. There is no evidence that the Union consented to the wage increases. Therefore, the Respondent would be justified in implementing the proposed raises only if the Union, by its silence, had waived its bargaining rights. It is, however, well established that a waiver of statutory bargaining rights must be clear and unmistakable.[7] We find that the Union's silence here, did not, under the circumstances, constitute such a waiver.

The Respondent's proposal for a January wage increase was made in the context of overall contract negotiations. However, the day after making the proposal, at a time when no bargaining was scheduled until mid-January, and before receiving a response from the Union, the Respondent announced to employees that the increases would be implemented on January 5, 1998. In these circumstances, we find that the Union was not properly afforded an opportunity to bargain concerning these proposals prior to the announcement. Further, after the November 13 announcement of the wage increase to employees, we find that the Union could reasonably conclude that the matter at that point was a fait accompli, i.e., that the Respondent had made up its mind and that it would be futile to object to the pay raises.[8] We find that the Union, therefore, did not clearly and unmistakably waive its right to bargain by remaining silent on the proposed wage raise. Accordingly, we agree with the judge that the Respondent violated Section 8(a)(5) by unilaterally implementing the wage increase for finishing employees on January 5, 1998.

We similarly find that the Union did not waive its right to bargain over the proposed February 2, 1998 wage raise proposal. As noted above, the February 2 wage increase was not proposed until January 21. After the January 21–22 bargaining session, the parties were not scheduled to meet again until February 11 and 12 (a session which, in any event, the Respondent cancelled). Thus, there was no opportunity to negotiate about the February 2 increase before it was implemented. Further, the Respondent specifically stated that this was a proposal, suggesting that it would only be implemented once it was agreed to by the

[4] In view of this conclusion, it is unnecessary to pass on the General Counsel's request to adduce further evidence on this issue.

[5] See GC Exh. 48a (stating that "effective that date [January 5] BPC is reinstating the original system [including pay increases]").

[6] See *Bottom Line*, 302 NLRB 373, 374 (1991); *RBE Electronics of S.D.,* 320 NLRB 80 (1995); *Vincent Industrial Plastics*, 328 NLRB 300 (1999), enfd. in relevant part 209 F.3d 727 (D.C. Cir. 2000). The Respondent has not proved and does not claim that there was any economic exigency which would permit it to compliment these changes absent agreement or impasse.

[7] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[8] *Insulating Fabricators, Inc. Southern Division*, 144 NLRB 1325, 1332 (1963). See generally *Intersystems Design Corp.,* 278 NLRB 759 (1986).

Union. We therefore agree with the judge that the Union cannot be said to have clearly and unmistakably waived its right to bargain about the February 2, 1998 raise. Accordingly, we find that the Respondent's unilateral granting of the February increase was unlawful.

3. The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by withholding a customary across-the-board pay increase in July 1998. The judge recommended that the Respondent be required to grant such increase to the full extent it would have done so in the absence of the Union, and that, if necessary, the determination of the amount of such increase should be resolved at the compliance stage of this proceeding. We note, however, that, for the past 25 years, the Respondent's July increase has been at least three percent, that the last four increases have been three percent increases, and that the Union has stated that it would agree to a three percent increase. In these circumstances, rather than leave the matter to compliance, we shall specify the required increase as three percent. We will modify the judge's recommended Order and notice accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Burrows Paper Corporation, Pickens, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Grant to all bargaining unit employees a 3-percent wage increase effective July 1, 1998."

2. Substitute the following for paragraph 2(d).

"(d) On request, bargain in good faith with the Union for an initial collective-bargaining agreement, reducing to writing any agreement reached as a result of such bargaining. The Union's certification year shall be extended for 1 year from commencement of bargaining."

3. Substitute the attached notice for that of the administrative law judge.

MEMBER HURTGEN, dissenting in part.

I agree that the Respondent engaged in surface bargaining, and unlawfully withheld a July 1998 pay increase, and blamed the Union for the lack of an increase. However, I do not find that the Respondent unlawfully raised the wages of certain employees in its finishing and maintenance departments in January and February 1998 without notifying and bargaining with the Union.

It appears that the Union itself raised the issue of pay discrepancies in the finishing department at the initial negotiating session on October 15, 1997. It was agreed that Respondent's agent, R. W. Burrows Jr., would investigate the matter and report back at the November session. He did so, and presented a corrected wage schedule. No union representative objected. Further, the Respondent's written proposal on the matter, handed to the Union at the November session, stated a January 5, 1998, effective date. The Respondent also issued a notice dated November 13, 1997, to all employees (including Local 678 president, Richard Washington, one of the Union's two negotiators) giving the same effective date.

The parties had no negotiations scheduled (and none took place) between November 13, 1997, and January 21, 1998. At the January 21 and 22 sessions, the Union again interposed no objection to the raises, which by that time had been in effect for more than 2 weeks.

At these January sessions, and again at the Union's initiative, the parties discussed the implementation at Pickens of a skill-based pay system for maintenance employees, which system was already in effect at the Respondent's union-represented facilities in New York. International representative, Michael Tourné, acknowledged that Burrows said he would implement the skill-based program on February 2. Again, there was no objection from the Union. Such program was implemented as of February 2. Indeed, it was not until the Union filed a charge relative to these matters in March 1998 that the Respondent learned of the Union's objection.

My colleagues rely on the judge's crediting of Tourné's testimony. However, Tourné testified only that he was *under the impression* that Burrows would not implement the raises without further discussion. There is no evidence that Burrows said or did anything to apprise Tourné that this would be so.

My colleagues note that Respondent said, in January 1998, that its proposals were not to be treated as actual contract language. In their view, this statement supports the 8(a)(5) allegation regarding the January and February increases. I disagree. There is nothing improper or unusual about a party submitting a proposal in bargaining, with precise contract language to be worked out later. The essential point is that Respondent clearly stated its intention to implement the increases.

My colleagues note that the February 2 increase was not proposed until January 21, and no meeting was scheduled until February 11 or 12. In response, I note that the Union could have picked up the phone and lodged a protest at any time during that 12-day period.

I do not agree with my colleagues that the issue here is to be decided under "waiver" principles. Where, as here, the parties have discussed a subject, the issue is simply whether the parties have reached an agreement on that subject. Under principles of contract law, the agreement

can be expressed, implied, or by acquiescence. Thus, the issue here is simply whether the Union agreed to, or at least acquiesced in, the two wage increases. It is clear that there was such agreement or acquiescence. As to the January increase, Respondent told the Union in November that the effective date would be January 5. On November 13, Respondent told the employees, by notice, the same thing. There was no Union objection. As to the February increase, Respondent told the Union on January 21–22 that there would be an increase on February 2. Following the earlier pattern, there was no union objection.

My colleagues state that there is no evidence that the Union consented to the wage increase at issue. For the reasons stated supra, I disagree. I emphasize in particular the facts that the changes were undertaken at the Union's initiative, and were essentially preannounced efforts by the Respondent to respond to the Union's concerns. In the absence of any indication on the part of the Union that it objected in any way to the Respondent's proposed remedies for those concerns, or to the Respondent's stated intent to put them into effect, I cannot agree with my colleagues that there was no evidence of Union consent.

In these circumstances, I find that the Respondent did not act unilaterally with respect to the finishing room and maintenance changes. Accordingly, I do not find that the Respondent's actions relative to these matters were unlawful.

As stated, supra, I do, however, find that the Respondent violated Section 8(a)(5) by engaging in surface bargaining and withholding a July 1998 pay increase, and Section 8(a)(1) by blaming the Union for the letter. Based on these violations, I also have a separate view as to remedy. The parties were negotiating a first contract. During negotiations, the Respondent made clear that there would be no contract, or—at most—only one that effectively excluded the Union from any role in determining major terms and conditions of employment. Indeed, the evidence shows that the Respondent's chief executive officer did not accept the Union's legitimacy as the employees' representative. Under these circumstances, it well may be wholly inadequate to simply order the Respondent to bargain in good faith. Such an order would not change Respondent's attitude and demonstrated antipathy to collective bargaining. And, without a change in attitude, the Respondent could resume similar tactics, albeit perhaps better disguised ones. A skilled mediator, however, could see through such tactics and could cause the Respondent to alter its conduct. In short, a mediator could help to insure that the bargaining would be in good faith. A mediator would also provide the Board with a window through which to observe the negotiations and to receive a first-hand neutral report of the bargaining.

Accordingly, I would authorize the Regional Director to appoint a mediator—chosen from a list of those qualified from an American Arbitration Association panel for the Regional Office area which includes Pickens. The selection may be of a person mutually selected by the parties or through a procedure of alternatively striking names from the list. The mediator would be directed, at Respondent's expense, to participate in all bargaining sessions, to attempt to forge an agreement, and—if an agreement is not reached during a period of time decided by the mediator—to render a report to the parties and to the Regional Director. That report should specify the status of the negotiations, including matters agreed on, matters not agreed on, the positions of the parties with respect thereto, and the mediator's recommendations, if any, concerning the bargaining and the resolution of the non-agreed to items.

I believe that such a remedy would "encourage the practice and procedure of collective bargaining."[1] Accordingly, I would impose it.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT take any action which interferes with the exercise of these rights.

WE WILL NOT inform employees that we will not grant the wage increases previously given in July of each year because they have selected the Union, PACE International Union Local 678, AFL–CIO, to represent them.

WE WILL NOT unilaterally withhold wage increases which we previously granted in July of each year because employees are represented by the Union.

[1] See Sec. 1 of the Act.

WE WILL NOT unilaterally grant wage increases to certain employees in the bargaining unit represented by the Union without first notifying the Union and bargaining with it in accordance with our duty under the Act.

WE WILL NOT refuse to bargain in good faith with the Union as the collective-bargaining representative of our employees in the following unit:

> INCLUDED: All full time and regularly scheduled part time production and maintenance employees and truck drivers employed at Respondent's Pickens, Mississippi facility.
>
> EXCLUDED: All other employees, including all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request by the Union, rescind the wage increases we unilaterally granted to certain employees in the finishing and maintenance departments in January and February 1998.

WE WILL grant to all bargaining unit employees a 3-percent wage increase effective July 1, 1998.

WE WILL, on request, bargain in good faith with the Union for an initial collective-bargaining agreement, reducing to writing any agreement reached as a result of such bargaining. The Union's certification year shall be extended for 1 year from commencement of bargaining.

BURROWS PAPER CORPORATION

Susan B. Greenberg, Esq., for the General Counsel.

John T. McCann, Esq, and *Lindsey Holmes–Hazelton, Esq. (Hancock & Estabrook, LLP*), of Syracuse, New York, for the Respondent.

Leeann G. Anderson, Esq., of Nashville, Tennessee, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on September 23, 1988, and October 26–29, 1998, in Memphis, Tennessee. After the parties rested, I heard oral argument, and on October 30, 1998, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The Remedy, Order, and Notice provisions are set forth below. Additionally, in light of Board precedent which issued after I delivered the bench decision on October 30, 1998, I have decided, sua sponte, to amend my conclusions of law, to find that the Respondent violated the Act by the conduct alleged in complaint paragraphs 13(b) and 15(a) and (b).

Amendment

Complaint paragraph 13(b) alleged that on or about June 30, 1998, Respondent unilaterally discontinued its established past practice of awarding unit employees an annual wage increase of at least three percent. In the decision I delivered from the bench on October 30, 1998, I found that there was an established past practice that the Respondent would grant some kind of raise in or around July of each year. However, I did not find that Respondent made an unlawful unilateral change by failing to give employees such a raise in 1998, and therefore concluded that the General Counsel had not established the violation alleged in complaint paragraph 13(b).

Complaint Paragraph 15(a) alleged that on June 3, 1998, Respondent issued a memorandum to its employees. The memorandum, attached to the complaint as Appendix A, stated, in part:

> Several Pickens employees have asked if there will be an increase in July this year. Under the National Labor Relations Act we are required to negotiate with the union. We are also required to keep everything as it was when you voted the union in, while negotiations are taking place.
>
> In January in response to your desire for fair treatment, we moved some wages. We thought the union agreed with us, but the union filed a charge against the company for raising those rates. We had to hire a lawyer to defend us. I believe that we were misled by the union on this and that we did the right thing to correct a perceived unfairness. We can not give any increase at this time without more charges being filed by the union.
>
> I feel that it is too bad we can not deal directly with you on the issue of wage increases. We must deal with the union. You must take your questions and concerns to the union, since you have chosen them to represent you.

Complaint paragraph 15(b) alleged that the statements in this Company's memorandum disparaged the Union and coerced employees by blaming the Union for the loss of an annual wage increase. Complaint paragraph 17 alleged that this action violated Section 8(a)(1) and (5) of the Act.

In the decision which I delivered orally from the bench, I recommended dismissal of the allegations raised by paragraph 15 of the complaint, on the basis that the statements in question were not coercive. This conclusion, I believed, was consistent with my finding that Respondent had acted lawfully in failing to give employees the raises to which its June 3, 1998 memorandum referred. See, e.g., *Alltel Kentucky, Inc.*, 326 NLRB 1350 (1998).

More recent cases have prompted me to reconsider this conclusion. On the same day I issued the bench decision, the Board issued its decision in *Rural/Metro Medical Services*, 327 NLRB 49 (1998). In that case, after a union petitioned to rep-

[1] The bench decision appears in uncorrected form at pp. 1215 through 1238. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

resent a unit of employees, the employer posted a notice which stated, in part: "During a meeting last night, the question was asked as to what would happen with performance reviews and merit increases if the union is voted in. . . . [I]f the union is voted in, all issues connected with wages, hours and working conditions are subject to negotiation. Therefore, the Company cannot change your wages (which include merit increases), hours and working conditions unless and until there is a contract." The Board found this language to be violative.

The Board based its decision in *Rural/Metro Medical Services* on a stipulated record. The stipulated facts included that it had been the employer's practice "to award merit increases ranging from no increase to an 8 percent increase, based on the performance reviews, *but entirely at the Respondent's discretion*." (Emphasis added.) However, based on other facts in the stipulated record, the Board found that the procedure this employer used, which carefully correlated the amount of the raise with the individual employee's performance review, constrained the employer's discretion.

The amount of discretion exercised by the employer in the *Rural/Metro Medical Services* case did not defeat the employees' expectation that they would receive a raise on a particular, regularly occurring date. Rather, the Board held that a merit wage program would be found to be a term and condition of employment when it was an established practice "regularly expected by the employees," and set forth three criteria for making such a determination:

1. The number of years the program has been in place;
2. The regularity with which raises are granted;
3. Whether the employer used fixed criteria to determine whether an employee will receive a raise, and the amount thereof.

A month after the *Rural/Metro Medical Services* decision, the Board issued its decision in *Kurdziel Iron of Wauseon*, 327 NLRB 155 (1998). In *Kurdziel Iron*, the Board reversed an administrative law judge's determination that the evidence was insufficient to show that the Respondent had a pattern or practice of granting cost-of-living increases on an annual basis.

In the present case, the evidence establishes that before 1998, Respondent had a past practice of granting a wage increase to employees each July. However, unlike the raises in the *Rural/Metro Medical Services* case, the record here does not establish that they were based on an assessment of any individual employee's performance. To the contrary, the evidence suggests that in a given year, all employees received the same percentage wage increase.

The percentage did not remain the same from year to year, and, over a long period of time, there was considerable variation. As I noted in the bench decision, the record indicates that Respondent retained considerable discretion as to the amount of the raise. However, applying the criteria set out by the Board in *Rural/Metro Medical Services*, I find that the employees still retained the expectation that they would receive a raise of some amount in July 1998.

Clearly, the practice of granting a raise of some kind had been in effect for a substantial number of years. It was also highly regular, taking place every July.

The third criterion in *Rural/Metro Medical Services*, whether the employer used fixed criteria to determine whether an employee received a raise, pertains specifically to the situation in which each employee receives a "merit raise" based on an individual performance evaluation. However, the record here does not establish that individual employees received different raises based on performance appraisals. Rather, it appears that every unit employee received a raise in the same percentage amount. Therefore, the third *Rural/Metro Medical Services* criterion is not applicable here.

In sum, I conclude that, based on Respondent's past practice, the unit employees had a reasonable expectation that they would receive a raise in July 1998. I further conclude that Respondent's failure to grant this raise in July 1998 constituted a unilateral change in an established term or condition of employment which was a mandatory subject of collective bargaining. This action violated Section 8(a)(5) and (1) of the Act. Therefore, I find that the General Counsel has established the violation alleged in complaint paragraph 13(b).[2]

The Respondent's June 3, 1998 memorandum, attributing the decision not to award raises in July 1998 to the Union's actions, must be considered in light of the conclusion that Respondent had a duty to grant employees a raise in July 1998 and violated Section 8(a)(5) and (1) by failing to do so. I conclude that the June 3 memorandum violates Section 8(a)(1) of the Act, as alleged in paragraphs 15 and 17 of the complaint. See *Rural/Metro Medical Services*, above. Although paragraph 17 alleges that the conduct described in paragraph 15 also violates Section 8(a)(5) of the Act, I believe that it is the actual withholding of the anticipated July wage increase, and not the announcement of it, which constitutes the Section 8(a)(5) violation.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act. Since August 8, 1997, the Union has been the exclusive collective–bargaining representative, within the meaning of Section 9(a) of the Act, of a unit of all full-time and regularly scheduled part-time production and maintenance employees and truck drivers, employed at Respondent's Pickens, Mississippi facility.

3. Since on or about October 15, 1997, and continuing through July 1998, Respondent failed to bargain collectively in good faith, as defined in Section 8(d) of the Act, with the Union with respect to wages, hours, and other terms and conditions of employment, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

4. By raising the wages of certain employees in the finishing and maintenance departments in January and February 1998, without notifying and bargaining with the Union, Respondent

[2] Complaint par. 13(b) alleges that the unilateral change took place on about June 30, 1998, whereas I find that the change took place in July 1998. The parties fully litigated this matter, and the slight difference in dates is not significant.

unilaterally changed a term of employment which was a mandatory subject of bargaining, in violation of Section 8(a)(5) and (1) of the Act.

5. By failing to grant wage increases in July 1998, notwithstanding its established past practice of raising wages in July of each year, the Respondent unilaterally changed a term of employment which was a mandatory subject of bargaining, in violation of Section 8(a)(5) and (1) of the Act.

6. By notifying employees, in a June 3, 1998 memorandum, that the Union was responsible for Respondent's decision not to grant its customary wage increase in July 1998, the Respondent violated Section 8(a)(1) of the Act.

7. The violations of the Act described above have affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. Additionally, it must recognize and bargain in good faith with the Union as the exclusive representative of the bargaining unit employees.

The Board certified the Union as the exclusive bargaining representative of employees in the unit on August 8, 1997. At all times on and after that date, Respondent has been under a duty to notify the Union before making a material, substantial, and significant change in any term or condition of employment which is a mandatory subject of collective bargaining. See *Millard Processing Services,* 310 NLRB 421, 425 (1993), citing *Angelica Healthcare Services Group*, 284 NLRB 844, 853 (1987). Moreover, the Act does not permit Respondent to make such a change without first obtaining the agreement of the Union or else bargaining until the parties reach a lawful impasse.

As stated by the Board in *RBE Electronics of S.D.*, 320 NLRB 80, 81–82 (1995), "when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain about a particular subject matter; rather it encompasses a duty to refrain from implementation at all, absent overall impasse on bargaining for the agreement as a whole." See also *Bottom Line Enterprises*, 302 NLRB 373 (1991); *Sartorius, Inc.*, 323 NLRB 1275 (1997); *NLRB v. Katz*, 369 U.S. 736, 748 (1962).

However, in January and February 1998, Respondent gave raises to certain employees in its finishing and maintenance departments without notifying the Union in advance and bargaining with it. Such raises constituted a material, substantial, and significant change in a condition of employment which was a mandatory subject of collective bargaining. Additionally, as discussed above, in July 1998, Respondent withheld a regularly–scheduled wage increase.

Respondent made these changes without the Union's consent, and without having reached a lawful impasse in bargaining. Moreover, the evidence did not establish the existence of any conditions, such as economic exigencies or delaying tactics by the Union's negotiators, which might create an exception to the general rule prohibiting these unilateral changes.

These violation must be remedied. The remedy will not require Respondent to rescind the raises it gave to the finishing and maintenance department employees unless the Union requests such a rescission. However, if requested by the Union, the Respondent shall reinstate the terms and conditions of employment which were in existence before the unlawful unilateral changes in wages in January and February 1998.

With respect to Respondent's failure, in July 1998 to grant employees the wage increase which it regularly had given at that time in previous years, Respondent must grant such increase to the full extent it would have increased wages in the absence of the Union. If necessary, the determination of the amount of such increase may be resolved at the compliance stage.

As stated above, I have found that between October 1997 and July 1998, the Respondent engaged in "surface bargaining," meeting with the Union without an intention to reach a collective-bargaining agreement, in violation of Section 8(a)(5) and (1) of the Act. This unfair labor practice took place during the first year after the Board certified the Union as the exclusive representative of Respondent's bargaining unit employees.

I recommend that the Board extend the certification year in accordance with *Mar-Jac Poultry*, 136 NLRB 785 (1962). Considering the small number of bargaining sessions, the lack of agreement between the parties, and the Respondent's manifest desire to stall the negotiations until the Union abandoned the employees, it appears clear that extending the certification year would not unduly saddle the employees with a bargaining representative they no longer desire. Rather, extension of the certification year would assure that it is the bargaining unit employees, and not their employer, who have the power to make such choices. In sum, I conclude that the *Mar-Jac* remedy is appropriate here. See *Bryant & Stratton Business Institute*, 321 NLRB 1007 (1996), and cases cited therein.

On the findings of fact and conclusions of law here, and on the entire record in this case, I issue the following recommended[3]

ORDER

The Respondent, Burrows Paper Corporation, Pickens, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> INCLUDED: All full time and regularly scheduled part time production and maintenance employees and truck drivers employed at Respondent's Pickens, Mississippi facility.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

EXCLUDED: All other employees, including all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Unilaterally changing any term of condition of employment of bargaining unit employees, including, but not limited to granting wage increases or otherwise changing the compensation of any bargaining unit employees without first giving the Union notice of the proposed change and an adequate opportunity to bargain in good faith to agreement or impasse concerning such changes, and also including failing to grant periodic wage increases which have become terms and conditions of employment.

(c) Informing employees that a periodic wage increase will not be granted because of the Union, or because employees selected the Union to represent them.

(d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind, in writing, its June 3, 1998 memorandum to employees regarding the reasons why they would not receive the wage increase which Respondent previously had given in July of each year.

(b) If requested by the Union, rescind the wage increases Respondent unilaterally granted to certain employees in the finishing and maintenance departments in January and February 1998, and restore the terms and conditions of employment in effect before it unilaterally granted such wage increases.

(c) Grant to all bargaining unit employees the wage increase Respondent would have granted in July 1998 but for its unlawful unilateral change in its practice of giving such wage increases in July of each year.

(d) Meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the unit described above in paragraph 1(a) of this Order.

(e) Preserve and, within 14 days of request, make available to the Board or its agents for examination and copying, all records necessary to determine that the terms of this Order have been complied with.

(f) Within 14 days after service by the Region, post at its facility in Pickens, Mississippi, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[4] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX A

BENCH DECISION

This is Bench Decision in the case of Burrows Paper Corporation, which I will call the Respondent, and United Paperworkers International Union, AFL–CIO, CLC, Local 678, which I will call the Charging Party or the Union. The case number is 26–CA–18552.

This Decision is issued pursuant to Section 102.35 Subparagraph (a) (10), and Section 102.45 of the Board's Rules and Regulations.

The Complaint alleges that the original charge in this proceeding was filed by the Union on March 4, 1998, and served on the Respondent by regular mail on March 5, 1998, and that the first amended charge was filed by the Union on July 14, 1998, and served by certified mail on July 31, 1998. Although Respondent's Answer denies these allegations, based upon the charge and the affidavit of service in evidence as General Counsel's Exhibit 1(a) and 1(b), I find the original charge in this proceeding was filed on March 4, 1998 and served on March 5, 1998 as alleged.

Based upon a written stipulation received in evidence as General Counsel's Exhibit 2, and upon General Counsel's Exhibits 1(e), 1(f) and 1(g) I find that the Union filed the first amended charge on July 14, 1998, and that the National Labor Relations Board served this charge on Respondent by certified mail on August 12, 1998.

In its Answer, the Respondent has admitted the allegations in Paragraphs 2 through 7 of the Complaint. Based upon those admissions, the written stipulation of the parties, and the record as a whole, I find the following facts to be true and established by the evidence:

At all material times the Respondent, a corporation with an office and place of business in Pickens, Mississippi, herein called the Respondent's facility, has been engaged in the manufacture of paper products. During the 12-month period ending June 30, 1998 Respondent, in conducting its business operations described above in Paragraph 2, sold and shipped from Respondent's facility goods valued in excess of $50,000 directly to points located outside the State of Mississippi.

During the 12-month period ending June 30, 1998, Respondent, in conducting its business operations described in Complaint Paragraph 2, purchased and received at Respondent's facility goods valued in excess of $50,000 directly from points located outside the State of Mississippi.

At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

At all times material for the purposes of this proceeding R. W. Burrows, Jr. was a supervisor of Respondent within the meaning of Section 2(11) of the National Labor Relations Act,

and an agent of Respondent within the meaning of Section 2(13) of the Act.

The Union is a labor organization within the meaning of Section 2(5) of the Act. The following employees of Respondent, which I will call the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Included: All full time and regularly scheduled part time production and maintenance employees and truck drivers employed at Respondent's Pickens, Mississippi facility.
>
> Excluded: All other employees, including all office clerical employees, professional employees, guards and supervisors as defined in the Act.

On August 8, 1997 the Union was certified as the exclusive collective-bargaining representative of the Unit following a representation election conducted by the National Labor Relations Board.

The General Counsel of the Board, in a Complaint issued on July 31, 1998 by the Regional Director of Region 26 of the Board, alleges that Respondent has failed and refused to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the Act.

I conducted a hearing in this case on September 23, 1998 and October 26, 27, 28 and 29, 1998 in Memphis, Tennessee. After the parties had presented their evidence, I heard oral argument on October 29, 1998, and am issuing this Bench Decision on October 30, 1998.

In the Complaint, the General Counsel alleges that Respondent breached its duty to bargain with the Union. The General Counsel alleges that various acts of the Respondent breached its duty to bargain under two separate legal theories. The Complaint alleges that Respondent made unilateral changes in working conditions which were mandatory subjects of bargaining without first notifying the Union and affording it an adequate time to bargain regarding those changes.

More specifically, Paragraph 13(a) of the Complaint, as amended orally by the General Counsel during the hearing, alleges that on or about January 5, 1998 and February 2, 1998, the Respondent unilaterally awarded wage increases to certain finishing room and maintenance employees in the bargaining unit.

Complaint Paragraph 13(b) alleges that on or about June 30, 1998, Respondent unilaterally discontinued its established past practice of awarding unit employees an annual wage increase of at least three percent.

Complaint Paragraphs 14(a) and (b) allege, in essence, that the wage increases described in Paragraphs 13(a) and 13(b) are mandatory subjects of collective bargaining and that Respondent made the change without giving the Union prior notice and an opportunity to bargain about them. Complaint Paragraph 17 alleges that by engaging in such conduct the Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

In addition to alleging that Respondent breached its bargaining obligation by making unilateral changes in wages, the Complaint also alleges that by its overall conduct, Respondent has failed and refused to bargain in good faith with the Union. More specifically the General Counsel contends that Respondent has gone through the motions of collective bargaining without having the intention of reaching an agreement.

Such a "surface bargaining" theory has its roots in Section 8(d) of the National Labor Relations Act which defines the duty of bargain as follows:

> For the purposes of this Section to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .

Embracing the forms of the bargaining process while trying to avoid its substance falls short of the good faith required to satisfy Section 8(d). It therefore would constitute a refusal to bargain collectively in violation of Section 8(a)(5) and (1) of the Act.

Besides the allegations that Respondent violated Section 8(a)(5) of the Act, the Complaint also alleges, in Paragraph 15, that Respondent violated Section 8(a)(1) by disparaging the Union and blaming the Union for the loss of an annual wage increase. An appendix to the Complaint makes evident that the alleged annual wage increase referred to in Paragraph 15 is the same as that referred to in Paragraph 13(b) of the Complaint.

For reason which I will discuss in detail, I find that Respondent did violate Section 8(a)(1) and (5) of the Act by unilaterally awarding wage increases to finishing room and maintenance employees on about January 5 and February 2, 1998, as alleged in Paragraph 13 of the Complaint. However, I do not find that Respondent violated the Act by discontinuing an established past practice of awarding unit employees an annual wage increase of at least three percent, as alleged in Paragraph 13(b) of the Complaint. Therefore, I will recommend that the Board dismiss Complaint Paragraph 13(b).

I will also recommend that the Board dismiss the allegations in Paragraphs 15(a) and (b) which concern how Respondent explained to its employees why they would not be receiving a wage increase in July 1998. This explanation relates the absence of a wage increase to the Respondent's duty to abstain from unilateral changes in mandatory subjects of bargaining, but I do not find that what Respondent told the employees interfered with, restrained or coerced them in violation of Section 8(a)(1).

The most difficult allegations, from my perspective, concern the Government's theory that Respondent engaged in unlawful surface bargaining. The General Counsel and Charging Party advanced a number of different arguments to support their contention that Respondent had not approached negotiations with the good faith required by Section 8(d) of the Act.

Some of these arguments make me uncomfortable because they might imply or appear to imply that the Board had authority to judge the substance of a collective bargaining proposal

and give it a "thumbs up" or "thumbs down". Paragraph 11 of the Complaint, for example, describes certain clauses which the Respondent proposed to the Union. Similarly, Paragraph 11 of the Complaint describes certain Union proposals which the Respondent rejected.

However, in argument, the General Counsel has been very careful to explain that the Government does not allege that the Respondent violated the Act either by proposing particular language or by rejecting any clause which the Union proposed. Similarly I would emphasize that to the extent that I may look at any of the Respondent's bargaining proposals, it is solely to glean insight into the intentions and good faith of the Respondent's officers who advanced that proposal. The Law does not give me either the mandate or the authority to take the Board's respected seal, displayed behind me in this hearing room, and make it some kind of contract language seal of approval.

Therefore, I will try not only to step lightly in this area but to describe the steps in sufficient detail to assist careful review. For reasons I will explain, the evidence leads me to conclude that Respondent did engage in surface bargaining in violation of Section 8(a)(5) and Section 8(a)(1).

Much of the testimony is in conflict. Before discussing the facts in greater detail, I will describe the credibility resolutions which form the basis for my findings of fact.

Even though the Local Union President, Richard Washington, Jr., attended the bargaining sessions and testified about them, I do not credit his testimony. Frequently while on the witness stand, Mr. Washington was unable to answer questions without first referring to the notes he made regarding the Union's negotiations with the Respondent. The great extent to which Mr. Washington had to rely on these notes would raise a concern about the reliability of his memory even if it appeared that the notes were a truly contemporaneous record of events and statements made during the bargaining.

However, it became clear during cross-examination that Mr. Washington's initial testimony about these notes was less than candid. When Respondent's attorney questioned Mr. Washington about these notes on October 26, 1998, the witness admitted that the notes used to refresh his recollection were not the original notes he had made during the bargaining sessions.

Rather, Mr. Washington testified, he wrote them over. However, the witness stated, he did not change the notes when he copied them. That statement was false, as Mr. Washington later admitted.

On further cross-examination, Mr. Washington stated that he had left his original notes at home. Since Respondent had subpoenaed these notes, which clearly were relevant to the issues raised by the Complaint, I directed Mr. Washington to return with the original notes the next day.

Mr. Washington returned with the original notes, which in some instances were significantly different from the ones he had brought to the hearing initially. Further cross-examination of Mr. Washington revealed that the notes which he had rewritten months after the events took place included details absent from the contemporaneous notes he had made during the bargaining sessions. Comparing certain original notes with the rewritten counterparts, Mr. Washington admitted that the rewritten version was nine pages long while the original notes were only five pages long.

Two aspects of this matter particularly called into question the reliability of Mr. Washington's testimony. First, it is clear that Mr. Washington did not tell the truth on October 26 when he stated under oath that he did not change the notes when he copied them. One day later, production of the original notes revealed significant differences. Only at that point, confronted by the discrepancy, did Mr. Washington admit that he did not simply recopy the earlier notes, but instead made substantive changes.

This admission establishes that Mr. Washington did not tell the truth when he testified that he made no changes when he recopied his notes. However, even more troubling than the fact Mr. Washington failed to tell the truth is the apparent reason for his lack of candor. The only apparent reason for this falsehood is a desire to influence the outcome of this proceeding, even at the expense of truth.

His initial claim that the copied notes were the same as the original cannot be understood as an exculpatory lie designed to get the witness out of trouble, because he wasn't in trouble. Similarly it cannot be understood as a yielding to some temptation to obtain a personal benefit. It does not appear that Mr. Washington stood to gain materially and personally from this misstatement of facts.

The only obvious reason why Mr. Washington would make this particular false statement while under oath is to influence this proceeding. If his desire to win this case is that strong, then none of his testimony can be trusted. Although I do not strike it physically from the record, I do not credit it and do not rely upon it for any purpose.

An International Representative of the Union, Michael Tourné, also testified for the General Counsel. Based upon my observations, I have no doubt that he was honest and sincere. On the other hand those laudable qualities do not always result in accuracy.

Frequently Mr. Tourné had to refresh his recollection of the negotiating sessions by reading from his notes. He was relatively new to the bargaining process. Observing Mr. Tourné even briefly led to the impression that he was very much a "people person" whose defining strength lay in a seemingly effortless ability to form easy relationships with other people. I did not get the impression that he coped with life by breaking down events into rigorously defined categories.

On the other hand, the Respondent's chief executive officer, R. W. Burrows, Jr., appeared to have an entirely different relationship with his daily planner. Referring to it while he testified, Mr. Burrows displayed an amazing command of how he had organized his time day by day more than a year ago. Clearly Mr. Burrows required himself to be precise. At one point in his testimony, he drew a distinction between the words "contract" and "agreement."

I believe both Mr. Tourné and Mr. Burrows intended to be honest witnesses. Any differences in the quality of their testimony likely would arise from the ways they value and process information. Where precision is important I will favor the testimony of Mr. Burrows because of his exactitude. Where mean-

ing depends on relationship more than definition, Mr. Tourné would appear to be the better reporter.

Based primarily upon my observations of demeanor, I credit the testimony of Marion William Martin, who testified for the General Counsel. In oral argument, the Respondent's counsel suggested that Mr. Martin's testimony might be affected by bitterness because recently, when some other employees in his department got a raise, Mr. Martin did not. Additionally, the Respondent's counsel suggested, Mr. Martin might also have been upset because the Respondent did not hire Mr. Martin's son for a position he wanted.

In his testimony Mr. Martin mentioned that he was embarrassed when the Respondent posted a list of employees who received raises, and Mr. Martin's name was not on it, prompting some employees to joke about it. However, I did not get the sense that Mr. Martin was bitter or vengeful.

To the contrary, Mr. Martin's testimony suggested that he viewed the new chief executive officer, Mr. Burrows, with considerable respect. Mr. Martin indicated that he believed that problems might continue at the plant because Mr. Burrows was not receiving correct information about them. Such personal loyalty to Mr. Burrows was evident, but I did not detect bitterness in his testimony. Neither what Mr. Martin said nor the way he said it created an impression that he was biased. I credit his testimony.

The Respondent's new Human Resources Manager, Paul Leonard Stachura, also created a favorable impression as a witness. Based on his demeanor, I conclude he was an honest witness. However, he did not become Human Resources Manager until May, 1998, and had not been involved in some of the events which are the subject of this case.

Turning now to the facts: As already stated, on August 8, 1997, the Board certified the Union as the exclusive bargaining representative of a unit of production and maintenance employees and truck drivers employed at Respondent's facility in Pickens, Mississippi.

By letter dated August 22, 1997, a Union representative notified Respondent's plant manager of the certification, sought to set up negotiations, and requested certain information to prepare for negotiations. See General Counsel's Exhibit 3.

Apparently, the plant manager forwarded the letter to Mr. Burrows at the Respondent's home office in Little Falls, New York. Mr. Burrows' response, on September 3, 1997, indicated that he had received the letter the previous day. This reply indicated that Mr. Burrows would be available for negotiations on October 15 and 16, 1997 and November 12 and 13, 1997. It concluded as follows:

> Travel to Pickens from Little Falls is usually an eight to ten-hour trip. From my three addresses, you will conclude that I carry a fairly long list of demands on my time.

See General Counsel's Exhibit 4.

After further correspondence, the parties met in Pickens, Mississippi for their first bargaining session on October 15, 1997.

In oral argument, the General Counsel contended that although Mr. Burrows testified that there were other commitments on his schedule which precluded him from meeting with the Union sooner than October 15th, he could have rescheduled some of them. Moreover the General Counsel asserts that Mr. Burrows' testimony on cross-examination acknowledges that he could have rescheduled some of those meetings.

I am not as eager as the General Counsel to infer an inkling of bad faith from the fact that Mr. Burrows did not reschedule meetings which were already on his calendar. The evidence clearly establishes that he is an extremely busy man who runs two separate companies, one of them a paper manufacturer and the other a bank. At some point, moving around appointments on a calendar book becomes as frustrating as solving a Rubik's Cube puzzle, and I am not sure how much the Board would ask or even could ask for that sort of action as a demonstration of good faith.

Moreover Mr. Burrows appears quite clearly to have an organized routine and an orderly temperament evident not only in his demeanor but in the notes he took while at negotiating sessions, in which he instructed himself to sort out a confusing matter. Perhaps, if Mr. Burrows typically did things on the spur of the moment, a reluctance to rearrange a schedule for a Union meeting might possibly say something about his attitude toward the Union. However, considering the value Mr. Burrows places on structure and order in all aspects of his life and work, I draw no inference from the fact that he did not cancel any existing appointments to meet with the Union sooner. Indeed the record does not establish that the Union ever asked him to do so.

Similarly I do not find very persuasive the General Counsel's related argument that Mr. Burrows took several vacations out of the country and that he could have cancelled one of these trips to meet with the Union. The record does not reflect what kinds of difficulties and expenses could result from cancelling an already - scheduled vacation trip.

Moreover, one of those trips was his planned honeymoon. Even among employment lawyers there are probably few who would give a higher priority to collective bargaining than to a honeymoon. I will not infer bad faith or hostility from the fact that Mr. Burrows apparently did not wish to postpone a marital union for a labor union.

The General Counsel and Charging Party also suggest that Mr. Burrows should have done more than get a plane ticket and hotel reservation before his first meeting with the Union. To my knowledge, neither the statute nor the Board's decisions establish any requirements for how a party should prepare for the first bargaining session to avoid creating the impression that he lacks good faith.

What happens during the bargaining itself certainly does shed light on the good faith of the parties. During oral argument, the General Counsel contended that at the first bargaining session, on October 15 and 16, 1997, Mr. Burrows rejected all of the Union's proposals, and that this action implied a lack of good faith. However, the General Counsel's argument must be considered along with Section 8(d) of the Act, which provides that the duty to bargain collectively—and here I quote from the statute—"does not compel either party to agree to a proposal or require the making of a concession." This provision does not contain an exception for the first day of bargaining.

The fact that a negotiator does not agree to a proposal on the first day he sees it does not suggest hostility to me so much as it indicates caution. I believe a more significant indication of good or bad faith can be obtained by looking at a series of bargaining sessions and determining whether the negotiations pick up momentum as the parties deal with each other. If the bargaining goes nowhere, then the next step is to figure out why.

In this case, a year has elapsed since the negotiations began. The record clearly establishes very little progress. In fact, one bone of contention has been the recognition clause, yet that is the one clause which should be the easiest for the Respondent to accept, because it costs the Respondent nothing.

The Board had issued its Certification some two months before negotiations began. Thus the Board had determined the scope of the bargaining unit, and by certifying that the Union was the exclusive representative of this unit, the Board told the Respondent to recognize the Union as such.

In other word, the Respondent did not have any discretion to bargain about the scope of the unit or about its duty to recognize the Union as the exclusive representative of employees in that unit. However, the Respondent did not agree to a recognition clause describing the unit as certified by the Board. Instead, at the second set of bargaining sessions, in November, 1997, the Respondent offered a contract proposal which contained the following recognition language. Noting that the letters "BPC" stand for "Burrows Paper Corporation" and that "UPIU" stands for "United Paperworkers International Union," I quote the Respondent's proposed recognition clause in its entirety and verbatim:

> BPC recognizes that the 65 Pickens employees voted 44-21 under NLRB sanctioned election to recognize the UPIU's claim to represent them. BPC agrees under NLRB Law to negotiate an agreement. BPC recognizes the right of the UPIU to walk away from their obligation to represent the Pickens employees after 31 July 1998. BPC agrees to treat the 65 Pickens employees fairly in either case.

If there is such a thing as "smoking gun evidence" in labor law, this "recognition clause" certainly must come close. Events which would otherwise seem ambiguous or nonsensical suddenly appear coherent and purposeful when considered with the words of that proposed clause.

As I will discuss shortly, the Respondent has proposed that its employees be paid at the minimum wage which is considerably less than the employees currently are making. Respondent's Human Resources Director offered an explanation which had some plausibility. Since the plant was in a poor rural area of Mississippi, management believed the Company could still attract the workers it needed even if it reduced wages and benefits.

However, we might regard that reasoning in social terms, such a motive does not constitute bad faith under the National Labor Relations Act. If an Employer truly wanted to drive that hard a bargain to reduce its expenditures for wages, it lawfully could take a tough stand during negotiations.

The recognition clause proposed by Respondent undercuts any assertion that Respondent's proposal to reduce employees to the minimum wage arose from monetary reasons. Consider this excerpt: "BPC agrees under NLRB Law to negotiate an agreement. BPC recognizes the right of UPIU to walk away from their obligation to represent the Pickens employees after 31 July 1998."

The only modification which might make Respondent's intention more obvious would be to follow this first sentence, "BPC agrees under NLRB Law to negotiate an agreement," with the parenthetical words "but you're not going to like it."

And it certainly does not require Sigmund Freud to understand the meaning of the next sentence: When the Respondent's recognition clause states "BPC recognizes the right of the UPIU to walk away from their obligation to represent the Pickens employees" it isn't difficult to see that language as a hint, even if not followed by the words "would you please?"

Respondent's design, to get rid of the Union as soon as the Certification year expired, became even more apparent when Respondent made a second attempt to draft a recognition clause. This clause appears in Respondent's January 21, 1998 proposal, General Counsel's Exhibit 10. This proposed clause states:

> BPC recognizes the UPIU Local No. 678 as the representative for the purposes of the NLR Act of a Paper Machine Room, Maintenance, Shipping and Receiving, Finishing Room and Pulp Room employees for the period of one year following the August '97 official certification.

Now why, one might ask, did the Respondent add the phrase "for the period of one year following the August '97 official certification"? That phrase certainly will not be found in the official Board Certification. To the contrary, under longstanding Board precedents, it is clear that the Union continues to enjoy a presumption of majority status, although a rebuttable one, after the certification year ends.

To borrow a phrase we hear a lot today in various contexts, including *Oprah*, it certainly appears that the Respondent, Mr. Burrows at least, was *in denial* or at least struggling with it.

Mr. Burrows' September 3, 1997 letter to International Representative Tourné referred to the recent vote as "our lost election." Significantly, in that letter Mr. Burrows requests that the Union representative provide him with proof that he is, indeed, a Union representative. Only then would Mr. Burrows provide the requested information.

That seems to me about as unusual as turning to someone and asking him to pinch you to be sure that you're not dreaming. The request for proof that Mr. Burrows put in his letter does suggest that Mr. Burrows is having a little difficulty accepting the results of the election. This request for proof seems to be saying "You mean, I really have a Union?"

Thereafter, the Respondent's efforts to insert a one-year limitation into the recognition clause suggest that Mr. Burrows is still struggling to accept the Union vote. In fact, the recognition clause in the Respondent's November 12, 1997 proposal even recites that the employees voted 44 to 21 to "recognize the UPIU's claim to represent them." On the witness stand this week—even though the vote was more than 14 months ago—Mr. Burrows again volunteered the numbers "44 to 21." He is still thinking about the tally of ballots.

I find that the Respondent's recognition clause proposals make obvious Respondent's hopes that the Union will go away when the certification year has ended. In this case the evidence also leads to the conclusion that Respondent's hopes are now Respondent's plans.

The language of Respondent's recognition proposals is central to my finding of a surface bargaining violation. The Respondent made a number of proposals which might, if considered individually, establish only a tough bargaining stand. However, I do not reach the question of whether these proposals, or any of them, would indicate bad faith if considered individually.

Respondent's intent is so apparent from its recognition clause proposals that I must consider it as part of the total picture. In that light, Respondent's intent not to reach agreement but somehow to divest itself of the Union is very clear.

With respect to the raises given certain employees in the finishing and maintenance departments in January and February, it is clear that there was no impasse, and that the Respondent could not implement these proposals without the Union's assent. For the waiver of a statutory right, silence does not give consent, and neither does ambiguity. The waiver of the statutory right must be clear and unequivocal. The person granting the waiver must do so knowingly.

The record does not establish that Union Representative Tourné knowingly gave such a waiver. I credit his testimony that he expected Mr. Burrows to look into the matter of raises for those employees but was not expecting it raises to be implemented without further discussion.

A statement in Respondent's January bargaining proposal also would lead Mr. Tourné to such a conclusion. At page 10 of the Respondent's proposal appears language that "all statements in this proposal are merely that—a proposal. These statements should not be construed as contract language."

Because the Respondent was submitting to the Union proposals it disavowed as being contract language, the situation was, at best, ambiguous and confusing. Under such circumstances the Union did not clearly and unequivocally waive its right to bargain.

Finally, there is the matter of the July 1998 raises. I find that there was an established past practice that the Respondent would grant some kind of raise, and that it would be on or around July of each year. Based on the testimony of Mr. Martin, which I credit, I find that the raise varied from year to year and that the Respondent retained considerable discretion as to the amount of the raise.

It is possible that the Board would find that the Respondent had a continuing duty to implement such a raise. However, I do not believe the case law is entirely settled on this issue. See, for example, *Daily News of Los Angeles*, 315 NLRB 1236 (1994).

After the Respondent unilaterally, and, as I have found, unlawfully implemented raises in January and February, the Union filed a charge about this change. Although a Union letter also assured the Respondent that it did not object to granting of a three-percent increase in wages across-the-board, I believe that the Union's letter did not, itself, relieve the Respondent of the dilemma it faced in deciding what action was most consistent with the Law. And I believe it faced a true dilemma in that regard.

So in these circumstances I recommend that the Board dismiss the allegations that Respondent made an unlawful unilateral change with respect to the July raise. Similarly I recommend that the 8(a)(1) allegation with the Respondent's notice about the wages also be dismissed.

When the transcript of this hearing is received I will prepare a Certification of Bench Decision which will attach the transcript to the Decision I have delivered orally. It will also include Order, Remedy and Notice Provisions. In the circumstances of this case I do consider a *Mar-Jac* remedy to be appropriate to extend the Certification year and, I will include that in my Certification and recommendation.

After this Certification is signed by me, the Board will serve copies of it on the parties in this case. At that time the period for appeal will begin to run.

When I was reading the exhibits last night and looking over the stipulation that was signed by counsel, and thinking back about how cooperative the parties were in this case, I was very appreciative of your professionalism and courtesy. And it's a real tribute to the Labor Bar that you all have such high standards. I really appreciate it.

The hearing is closed.

(Whereupon, at 1:09 P.M. the hearing was concluded.)